

Without widespread advance notice, at the end of 2021, Indonesia's Directorate General of Mineral and Coal (DGMC), part of the Ministry of Energy Mineral Resources (MEMR), issued a controversial decree banning mining companies from exporting coal throughout January 2022.

This prohibition is set out in letter No. 1605/2021 issued by the DGMC on 31 December 2021 regarding the Fulfilment of Coal Needs for General Electricity (Letter 1605/2021). Letter 1605/2021 prohibits certain classes of Indonesian coal producers from exporting coal for the period between 1 to 31 January 2022. Letter 1605/2021 also requires coal which has been loaded and placed at the loading port and/or loaded onto vessels, to be immediately redirected and delivered to Indonesia's thermal coal power installations operated by Indonesia's state-owned power company.

The new law has come amid an acute domestic power shortage with the hope it works to alleviate domestic power shortages.

The legal basis for the prohibition was explained in Letter 1605/2021 to be a decree previously issued by the MEMR that makes it compulsory for holders of certain permits to fulfil domestic coal supply in an emergency situation. Under this rule, such holders are required to sell 25% of their output to a local power plant at a maximum price of US\$70 per tonne. Letter 1605/2021 points out that the basis for such a ban is a letter issued by the president of Indonesia's state-owned power company informing that there has been a dearth of supply in the domestic coal power plants. This has raised concerns that there may be widespread blackouts across Indonesia, necessitating a pre-emptive coal export ban for the month of January.

Mining companies will be subject to the prohibitions set out in Letter 1605/2021 if they are the holders of a (a) Mining Business Permit; (b) Special Mining Business Permit (IUPK); (c) IUPK as a continuation of Coal Contract of Work; and/or (d) Coal Transportation and Sales Permit.

Potential Impact on Coal Sales Contracts and Shipping Contracts

The above export ban will have a major impact on the performance of international coal sale contracts. It should be noted that legal issues will arise not only for the exporters or sellers, but also for the buyers under the sale contracts, as well as shipowners under charterparties to lift coal from Indonesian ports. It is imperative that parties to sale contracts assess whether the provisions of Letter 1605/2021 will trigger the application of force majeure provisions or breach of contract as a result of a delay in the coal delivery.

Parties should consider whether the export ban will fall within the definition of force majeure events within the relevant clause(s) of the contract, and what the impact of the period of ban will be. In some cases, the parties' time to perform their obligations may be extended, or even excused entirely, but this ultimately depends on the terms of the contract.

Parties should also bear in mind that force majeure clauses frequently contain requirements for the party relying on such clause to give written notice of the force majeure event to the other party within a fixed time frame, failing which any right to rely on the clause may be forfeited. Care should also be given to ensure that the force majeure notice does not state an intention not to perform once the force majeure situation ends.

Depending on the precise terms of the force majeure clause, either party may be entitled to cancel the contract altogether without any liability, or their time for shipment and/or taking delivery may be extended or rolled over. Consideration should also be given to termination event(s) in respect of advance payments and whether a period of force majeure continuing for a certain period of time might require the seller to reimburse the advance payments early at the end of such period (although this is not always the case and could be a negotiated point).

For buyers who on-sell coal purchased from Indonesian exporters, the terms of the on-sale contracts may result in penalties for late delivery unless such buyers can, in turn, rely on any force majeure clauses in these contracts.

Under charterparties, shipowners may be in a position to cancel the charterparty. As a result, charterers could be at risk of missing loading windows, and certainly at risk of demurrage liability for arrived ships that cannot commence or complete loading.

While charterparties may not have force majeure provisions (parties should have this checked), charterers should also carefully review their laytime and demurrage exceptions, and their ability to pass on any demurrage liability up the sale contract chain. Shipowners should also consider whether there is any knock-on effect on any of their other charters if vessels are delayed due to the unloading and redirection requirements of cargoes already loaded in Indonesia.

How We Can Help

We have a dedicated team of commodity and shipping lawyers (including Indonesian-qualified lawyers who speak Bahasa Indonesia) with a track record of dealing with Indonesian legal issues and of successfully advising clients on contracts affected by previous export bans in Indonesia. We are, therefore, well placed to assist clients in assessing the risks and providing solutions as a result of the above prohibition.

Contacts

Ivan Chia

Partner, Singapore
Corporate
M +65 8389 4571
E ivan.chia@squirepb.com

Brian Gordon

Partner, Singapore/Dubai
Corporate
M +65 8611 3180
E brian.gordon@squirepb.com

Jessica Kenworthy

Partner, Singapore
Trade Finance and Shipping Finance
T +65 6922 7871
M +65 9733 4864
E jessica.kenworthy@squirepb.com

Kate Sherrard

Partner, Singapore
Shipping Finance
M +65 9856 7084
E kate.sherrard@squirepb.com

Barry Stimpson

Partner, Singapore/Perth
Shipping and Commodities Trading and Disputes
T +65 6922 7870
M +65 9111 8780
E barry.stimpson@squirepb.com

Chris Swart

Partner, Singapore/London
Shipping and Commodities Trading and Disputes
M +65 9092 1883
M +44 734 210 6010
E chris.swart@squirepb.com

John Rollason

Director, London
Shipping and Commodities Trading and Disputes
T +44 20 7655 1745
M +44 751 348 0590
E john.rollason@squirepb.com

Eviaty Jenie

Senior Associate, Singapore
Shipping and Commodities Trading and Disputes
T +65 6922 7877
M +65 8907 0296
E eviaty.jenie@squirepb.com